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Supreme Court of the United States

OCTOBER TERM, 1945.

CHARLES M. CROWHURST, P. JAMES CROWHURST, HARRY L. CROWHURST, WINTHROPE A. CROWHURST, ELLEN CROWHURST, SARAH CROWHURST, ETHYLE W. KAPLAN, LILLIAN A. KAPLAN, Individually, LILLIAN A. KAPLAN, as trustee for Esther R. Kaplan, Ilene A. Kaplan and Herbert E. Kaplan, EMILY R. KAPLAN, individually and EMILY R. KAPLAN, as trustee for Jean F. Kaplan, Edward K. Kaplan and Sylvia R. Kaplan, partners trading as A. J. CROWHURST & SONS,

Petitioners,

vs.

JOSEPH GRASSO,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

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Petitioners,

vs.

JOSEPH GRASSO,

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable Chief Justice of the United States and Associate Justices of the Supreme Court of the United States:

Your petitioners, CHARLES M. CROWHURST, P. JAMES CROWHURST, HARRY L. CROWHURST, WINTHROPE A. CROWHURST, ELLEN CROWHURST, SARAH CROWHURST, ETHYLE W. KAPLAN, LILLIAN A. KAPLAN, Individually, LILLIAN A. KAPLAN, as trustee for Esther R. Kaplan, Ilene A. Kaplan and Herbert E. Kaplan, EMILY R. KAPLAN, Individually, and EMILY R. KAPLAN, as trustee for Jean F. Kaplan, Edward K. Kaplan and Sylvia R. Kaplan, partners trading as A. J. CROWHURST & SONS, pray that a Writ of Certiorari issue to review the order of the United States Circuit Court

of Appeals for the Third Circuit reversing the order of the United States District Court for the District of New Jersey, which dismissed the respondent's petition for an order that the petitioners be directed to restore the respondent to the position held by him in the employ of the petitioners at the time of his induction into the armed services of the United States. The said petition in the District Court had been brought on pursuant to the provisions of the Selective Training and Service Act of 1940, Title 50, App. U. S. C. A. Sec. 308.

Summary Statement.

At the time in question. (October 1943), Section 308 (b) provided that a person who had left his employ in order to perform training and service in the armed services, was entitled to restoration to his position upon his discharge provided

(1) that he received an honorable discharge;

(2) that he is still qualified to perform the duties of such position;

(3) that he makes application for re-employment within forty days after he is relieved from such training and service.

The petitioners are co-partners and as such conduct a tannery under the trade name of A. J. Crowhurst & Sons in Belleville, New Jersey. For some years prior thereto and at the time of his induction into the United States Army, the respondent had been employed as a tacker in the plant currently owned and operated by the petitioners. The respondent was discharged from the United States Army on Oc-

tober 5, 1943 (A12a) because of a physical disability (A35a). On October 29, 1943, he visited the office of the petitioners, and in a conversation with Charles M. Crowhurst, one of the petitioners, requested an indefinite leave of absence (A23a, 34a, 35a).

At that time an agreement existed between the petitioners and Local 27, International Fur and Leather Workers' Union, the collective bargaining agent of the petitioners' employees, that no indefinite leaves of absence would be granted under any conditions, and that leaves of absence for a definite period would be granted only upon the recommendation of the company physician (A39a, Exhs. R-4, R-5). Accordingly, the respondent's request for an indefinite leave of absence was refused and he was advised that a leave of absence for a definite period would be granted only if recommended by a Dr. Crecca, the company physician (A35a, 37a). The respondent thereafter submitted to an examination by Dr. Crecca, who pronounced him unable to work as a tacker because of his physical disability (A38a). A few days later the respondent again visited the petitioners' plant. On that occasion he requested a release so as to secure employment elsewhere but was advised that a release was unnecessary (37a, 38a). No further discussions relative to the respondent's re-employment by the petitioners were had at any time within forty days following upon the respondent's discharge from the United States Army.

On June 12, 1944, approximately eight months after his discharge from the Army, the respondent instituted a proceeding in the United States District Court of New Jersey for an order seeking to compel the petitioners to reinstate

the respondent to the position held by him at the time of his induction into the armed forces (A3a-7a).

The petitioners, in their Answer, asserted that:

> (1) the respondent was not physically qualified to perform the duties incident to such position, and
>
> (2) he had not made application for re-employment within the meaning and intent of the Selective Training and Service Act, within forty days after he had been relieved from military service (A8a-10a).

At the trial it was admitted that there were only two conversations between Crowhurst and Grasso during the forty day period following upon the latter's discharge from the Army (A21a). It was further admitted that on the occasion of the first conversation Grasso had not indicated either a desire or a willingness to return to work, but had requested a leave of absence for an indefinite period of time (A25a). The same was admittedly refused and Grasso was sent to Dr. Crecca in order to determine whether a leave of absence for even a definite period of time should be granted to him. It was further conceded that Dr. Crecca found Grasso physically unqualified to perform the duties of a tacker and so advised both him and Crowhurst (A13a, 38a). The trial then proceeded on the theory fully developed by the respondent herein (A51a) and assumed by both sides to exist, that Grasso's application for a leave of absence had been refused (Finding of Fact No. 19). For the purposes of this petition the second conversation is unimportant, because although an issue was raised at the trial relative to the same, the Circuit Court of Appeals did not dis-

turb the Finding of Fact made by the trial court to the effect that in the second conversation Grasso had merely requested a release.

The trial court rendered an opinion (A52a-61a) in which it found as follows:

> (a) that the respondent was not disqualified from performing the duties of his position as a tacker (A54a),
>
> (b) that the respondent at no time within a period of forty days from the date of his discharge from the armed forces requested re-employment by the petitioners (A61a),
>
> (c) that the respondent's request for a leave of absence did not constitute an application for re-employment within the purview of the Selective Training and Service Act of 1940 (A58a, 59a).

Findings of Fact consistent therewith were made by the trial court and an order was entered dismissing the petition (A62a).

The respondent filed a notice of appeal to the Circuit Court of Appeals for the Third Circuit and in connection with said appeal, and pursuant to Rule 75 (d) of the Federal Rules of Civil Procedure, served and filed a statement of the points intended to be urged on the appeal together with a designation of the contents of record on appeal. The transcript of the record was prepared in accordance therewith and all testimony and exhibits not related to the matters urged in the Statement of Points, were properly omitted therefrom. In the brief filed by the appellant in the Circuit Court of Appeals it was specifically set forth that the only question involved on the appeal was as follows:

"Does application for leave of absence constitute application for re-employment within the meaning of Section 8 (b) (3) of the Selective Training and Service Act, 54 Stat. 885, U. S. C. A. Title 50 App. Sec. 309 (b) (3)."

The Circuit Court of Appeals answered the said question in the affirmative and reversed the order made by the trial court. Moreover, in the opinion rendered by the Circuit Court of Appeals in connection with the said reversal, Finding of Fact No. 19 made by the trial court was set aside, although no issue relative to the propriety of the same had been taken by the appellant either in his Statement of Points or in his brief, and which fact, as found by the trial court, was not only correctly assumed to exist by all of the litigants at the trial, but in addition thereto had been fully developed and urged by the appellant.

Jurisdiction.

This court has jurisdiction under Judicial Code, Section 240, Subdivision (a). This petition for a Writ of Certiorari is timely, as the decision of the Circuit Court of Appeals was rendered on February 26, 1946.

Questions Involved.

(1) Does an application for a leave of absence constitute an application for re-employment within the meaning of Section 308 (b) (3) of the Selective Training and Service Act of 1940, Title 50, App. U. S. C. A.?

(2) Is it proper for a Circuit Court of Appeals to set aside a Finding of Fact, the correctness of which is as-

sumed to exist by all of the litigants and is therefore not controverted at the trial; and which fact is consistent with and invited by the position taken at the trial by the appellant; and relative to the propriety of which no issue is taken by the appellant either in the Statement of Points or in the brief submitted by him to the Circuit Court?

Reasons Relied Upon for the Allowance of the Writ.

A. As to Question No. 1. The construction of the phrase "makes application for re-employment", as intended by Congress in the enactment of the Selective Training and Service Act, presents a question of Federal law which has not been, but should be, settled by this court. The importance thereof is a matter of national significance affecting millions of veterans.

B. As to Question No. 2. The Circuit Court of Appeals for the Third Circuit, in setting aside a Finding of Fact determined by the trial court under the circumstances inherent in the trial of this case, has decided an important question of Federal law contrary to the decisions of this court and in conflict with decisions of other Circuits. See: *Brown* v. *Gurney*, 201 U. S. 184; *Baker* v. *Kaiser*, 126 Fed. 317 (8th Cir.); *Rosaly* v. *Gonzales*, 106 F. (2d) 169 (1st Cir.); *Mutual Benefit Health & Accident Assn.* v. *Warrell*, 96 F. (2d) 447 (8th Cir.); *Pitcairn* v. *Fisher*, 78 F. (2d) 649 (8th Cir.); *U. S.* v. *National City Bank of N. Y.*, 281 Fed. 754 (2nd Cir.); *Southern Pacific Co.* v. *Hall*, 100 F. 760 (9th Cir.); *Southern Cotton Oil Co.* v. *Shelton*, 220 F. 247 (4th Cir.).

WHEREFORE, your petitioners respectfully pray that this petition for a Writ of Certiorari to review the order heretofore made herein by the Circuit Court of Appeals for the Third Circuit, be granted.

Dated: New York, May 14, 1946.

CHARLES M. CROWHURST, P. JAMES CROWHURST, HARRY L. CROWHURST, WINTHROPE A. CROWHURST, ELLEN CROWHURST, SARAH CROWHURST, ETHYLE W. KAPLAN, LILLIAN A. KAPLAN, Individually, LILLIAN A. KAPLAN, as trustee for Esther R. Kaplan, Ilene A. Kaplan and Herbert E. Kaplan, EMILY R. KAPLAN, Individually, and EMILY R. KAPLAN, as trustee for Jean F. Kaplan, Edward K. Kaplan and Sylvia R. Kaplan, partners trading as A. J. CROWHURST & SONS.

By CLARENCE FRIED,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION.

Statement.

The basic facts are set forth in the foregoing petition. So far as may be necessary, further facts will be discussed in connection with the argument.

POINT I.

A request for a leave of absence does not constitute an application for reemployment within the meaning and purview of Section 308 (b) (3) of the Selective Training and Service Act of 1940.

The trial court found and the Circuit Court did not disturb the finding that the ~~petitioner~~ respondent had merely requested a leave of absence. The error committed by the Circuit Court in setting aside the finding of the trial court to the effect that the requested leave of absence had been refused, is dwelt upon in Point II hereof. However, conceding for the purposes of this Point that there may be some question as to whether there is sufficient evidence in the record to support the finding that the request for a leave of absence had been refused—there is nonetheless not a single word in the record which either directly or inferentially would permit of the conclusion that the request for a leave of absence—had been granted. This is not disputed in the opinion rendered by the Circuit Court. Therefore, adopting the most favorable view of the record to the position taken by the Circuit Court, we still are met with the undisputed fact

that, at best, the respondent had merely requested a leave of absence which although perhaps not expressly refused —was nonetheless, most certainly—not granted. Accordingly, this Point is confined to the question as to whether a request for a leave of absence, standing alone, is an application for reemployment within the purview of Section 308 (b) (3) of the Selective Training and Service Act of 1940.

The trial court held that the same was not an application for reemployment (A58a, 59a). The Circuit Court, in referring to the said conclusion of the trial court, said as follows:

> "This we think is a far too narrow construction of the statutory language * * * makes application for re-employment".

Therefore, the issue revolves itself about what was Congressional intent in the use of the phrase "makes application for re-employment". The answer lies both in the context of the Statute and in the purposes and objectives which motivated its enactment.

In speaking of the context of the Statute, attention is respectfully directed to the fact that Section 308 (c) and (d) of the Act specifically states that an employee shall be considered as having been on "furlough or leave of absence during his period of training and service". Therefore, unless 'distortion' rather than 'construction' is intended, how can it possibly be urged that in using the phrase "application for re-employment" Congress intended that the same could be accomplished by a request for a leave of absence when the Act itself states that that is

the status of the employee during the period of his training and service? A mere understanding of the English language hardly approaching the dignity of construction, permits of no conclusion other than that Congress, in using the phrase "application for re-employment", meant the resumption of active service as an employee as distinguished from the leave of absence status existent during the period of his training and service in the armed forces.

Moreover, aside from the literal interpretation of the language used in the Statute, any construction thereof must be resolved in the light of that which was sought to be accomplished by its enactment.

Although the Act protected those serving in the armed forces, it was intended to give creation to a "shield" as distinguished from a "sword". As stated in Section 301 (b) of the Act, the objective sought to be accomplished was that "the obligations and privileges of military training should be shared generally in accordance with a fair and just system * * *." In speaking of a "fair and just system", Congress intended to give creation to an Act which would be just and fair to all persons—employer, veteran and non-veteran employees. It sought to and did accomplish its objective without subjecting employers and non-veteran employees to needless hardships. It was for that reason that the forty day limitation period was inserted in the Act. Congress appreciated that although a veteran was entitled to return to his job, the right and privilege given to the veteran was of such a nature that unless he asserted it within a reasonable period of time after his discharge, a chaotic condition might result insofar as his employer and his fellow non-veteran employees were concerned. Con-

gress defined that reasonable period as forty days from the date of discharge, and thereafter by amendment of December 8th, 1944 (not applicable to the instant case), extended the said period to ninety days. The reason for the limitation is manifest. How else could an employer know when his obligation to restore a veteran to his former position ceased? How else could a fellow non-veteran employee ever know when the security incident to his employment no longer could be impaired? Common sense, logic and the "fair and just system" sought to be achieved dictated the forty day limitation.

However, if the decision of the Circuit Court be correct that a mere "application for a leave of absence" is an "application for re-employment", does not the same destroy the limitation which logic and fairness impelled Congress to impose? If all that a veteran had to do in order to avail himself of the rights and privileges conferred upon him by the Act, was to show that he had called upon his employer within forty days from the date of his discharge and had requested a leave of absence—what would prevent him from extending the period to ten weeks, months or years? Particularly is this true, if as in the instant case, it would not be incumbent upon the veteran to affirmatively establish that the employer had acquiesced in the requested leave of absence.

No better illustration of the chaos which would result and the unfairness of the same to both the employer and fellow non-veteran employees can be found than by quoting directly from the testimony adduced during the course of the trial of this proceeding:

"A23a

Q. Now, how long a leave of absence did you ask for? A. I had no set time in mind.

Q. Well, was there any mention made of the period during which you wanted to have a leave of absence? A. No, sir.

Q. Did you ask for an indefinite leave of absence? A. Yes.

* * * * * * *

Q. Did you tell Mr. Crowhurst why you wanted a leave of absence? A. No.

Q. And he didn't ask you? A. He may have but I don't recall.

Q. But you are certain that whether he asked you or whether he didn't ask you, you didn't tell him why you wanted a leave of absence? A. I am positive.

Q. Although he might have asked you? A. He may have asked me.

* * * * * * *

A25a

Q. For how long a period of time did you want a leave of absence? A. As long as I saw fit that I wanted to take it.

Q. And that is what you told Mr. Crowhurst? A. I didn't tell him anything."

Can the foregoing possibly be in keeping with the "fair and just system" sought to be achieved by Congress?

It is respectfully submitted that if one looks to both the context of the Statute and the objectives sought to be achieved by its enactment, it permits of no other conclusion than that Congress, in using the phrase "makes application for re-employment", intended that a veteran who desired to resume his former employment would be prepared to

start working within forty days from the date of his discharge. Mere proof of the making of an application for a leave of absence—standing alone—*without either a scintilla of evidence or even the contention that the same had been granted*—in no respect approaches an application for re-employment within the meaning and purview of Section 308 (b) (3) of the Selective Training and Service Act of 1940.

POINT II.

The Circuit Court erred in setting aside the trial court's Finding of Fact No. 19 to the effect that the respondent's request for a leave of absence had been refused by the petitioners.

Throughout the trial both sides assumed that Grasso's request for a leave of absence had been refused. The same was not controverted at the trial, and furthermore, was wholly consistent with the position taken and invited by Grasso at the trial. This is best illustrated by the following testimony in the record (Re-direct examination of Grasso) (A51a):

(p. 420)

> "Q. After you asked Mr. Crowhurst for a leave of absence (p. 421) *and he told you that you couldn't get a leave of absence,* what did you tell him? What did you say? A. Well, I told him I was a veteran and the Veterans Act would help me get my job back, and he said 'Oh, it don't pertain to that. There isn't a law passed that could force me to hire you back.' And so, not to argue it, I have argued enough on the case—"

The foregoing is typical of the entire record, all of which substantiates the assumption by both sides that the requested leave of absence had been refused. No issue or controversy was taken relative to the same and the case was tried on that theory adopted by both sides. The transcript of the record does not contain all of the evidence adduced at the trial in connection with said finding because no issue relative to the propriety of the same was taken by Grasso either in the Statement of Points or in the Brief filed in his behalf in the Circuit Court. Accordingly, it not being a matter at issue in the Circuit Court, it not only was unnecessary, but moreover would have been highly improper, to burden the transcript of the record with matters not relevant to the appeal. (Rule 75 (d) of Federal Rules of Civil Procedure and Rule 26 (2) (b) of the Rules of the Circuit Court of Appeals for the 3rd Circuit).

As stated in Cyclopedia of Federal Civil Procedure, Volume XI, Section 5540:

> "A written or printed record is the basis of all ordinary modes of review by a higher court. Barring matters of which the court may take judicial notice, consideration of court of review is confined to the record which is filed therein in the particular case, and it is consequently a matter of general principle, recognized by all reviewing courts and not peculiar to Federal Courts, that the errors assigned and relied on must appear by the record and will otherwise not be inquired into or considered * * * Some error must be shown, and if none is shown, the judgment must be affirmed. More often these are but expressions of the rule that review is confined to the errors assigned, argued and apparent by the record, in that form being the statement of a

principle of review. These general rules of law are corollary to each other and too elementary to justify citations of authority, which may be found in abundance in digests."

Particularly is this true where the same involves a finding of fact made by the trial court.

Cyclopedia of Federal Civil Procedure, Volume 12, Section 6211, page 266:

> "Where a case is tried by the court, a jury having been waived, the court's findings upon questions of fact are conclusive upon appeal no matter how convincing the argument that upon the evidence, the findings should have been different, unless there is no substantial evidence to support them."

Cyclopedia of Federal Civil Procedure, Volume 12, Section 6211, page 270:

> "In the absence of a proper record, shown to contain all the evidence essential to enable the Circuit Court of Appeals to determine the correctness or incorrectness of the challenged findings, such findings cannot be questioned on review * * * and the courts have gone so far as to hold that the presumption of correctness which attached to the findings made by a trial court is sufficient to withstand an attack made upon an obviously incomplete record."

In the instant case, not only was the record incomplete, but moreover the finding was not even challenged by the appellant.

With regard to the question as to whether or not there was any substantial evidence to support the finding that the

request for a leave of absence by Grasso had been refused, can there conceivably be any better demonstration thereof than the testimony of Grasso as elicited by his own attorney (A51a)? Where then is there any "substantial error" in the lower court's finding that the request for a leave of absence had been refused?

Moreover, even if it be hypothetically assumed that there was no basis for the court's finding that the request for a leave of absence had been refused, Grasso, by reason of the fact that his counsel invited the commission of said error by the aforementioned assumption of a fact not established, is estopped from questioning the same on appeal.

Brown v. *Gurney*, 201 U. S. 184, 190; 26 Sup. Ct. 509, 511:

> "But the Supreme Court applied the rule that where the existence of certain facts is assumed in the trial court and the trial proceeds, without objections, on that assumption, and the case is decided in reliance thereon, neither party will be heard in the court of review to question there for the first time the existence of the facts. * * *"

Baker v. *Kaiser*, 126 Fed. 317, 319 (8th Cir.):

> "* * * A theory of a case or an assumption of fact adopted by a trial court with the acquiescence of the parties will be followed by an appellate court to which the cause is taken."

Southern Cotton Oil Co. v. *Shelton*, 220 F. 247 at 256 (4th Cir.):

> "On the other hand, we read the authorities as holding that it is not allowable for any party, who has taken one position on a question of fact on the

trial below, to take an inconsistent position in the appellate court."

Cyclopedia of Federal Civil Procedure, Volume 12, Section 6191, pages 135, 136:

> "A party cannot go behind admissions made by him in the lower court; and a fact or conclusion admitted by the party in his pleadings, or in the trial or hearing of the cause, or assumed by both parties to exist, is not open to be controverted or put in issue in the appellate court."

Again at page 137:

> "Federal Appellate Courts adhere to the rule that a party on appeal will not ordinarily be permitted to complain of an alleged error which he himself invited, or which at his instance or inducement the Court committed, nor of errors of like character to those thus invited or induced."

See:

Rosaly v. *Gonzales*, 106 F. (2d) 169 (1st Cir.);
Mutual Benefit Health & Accident Ass'n. v. *Warrell*, 96 F. (2d) 447 (8th Cir.);
Pitcairn v. *Fisher*, 78 F. (2d) 649 (8th Cir.);
U. S. v. *National City Bank of N. Y.*, 281 Fed. 754 (2nd Cir.);
Southern Pacific Co. v. *Hall*, 100 F. 760 (9th Cir.).

In 2 Standard Procedure, 244, 245:

> "Consistency of position is a fundamental requisite in appellate proceedings. Parties will not be permitted to take in the appellate court a course at variance with, or inconsistent with, the course fol-

lowed by them below. Where a case is heard or tried in the lower court upon a certain theory, another and different theory cannot be presented upon appeal."

It is therefore respectfully submitted that as a matter of law the Circuit Court erred in setting aside the trial court's Finding of Fact that Grasso's request for a leave of absence had been refused.

Conclusion.

For the reasons stated in the petition and in this brief, it is respectfully submitted that the application for a Writ of Certiorari should be granted.

Respectfully Submitted,

CLARENCE FRIED,
Counsel for Petitioner.

ROBERT SCHERLING,
EDWARD F. ROSINY,
Of Counsel.